

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI
GREENVILLE DIVISION

CHARLIE WILLIAMS, JR.
Plaintiff

V.

NO. 4:96CV158-B-B

TOGO D. WEST, JR.,
SECRETARY OF THE DEPARTMENT
OF THE UNITED STATES ARMY
Defendant

MEMORANDUM OPINION

This cause comes before the court upon the defendant's motion to dismiss, or in the alternative, for summary judgment. The court has duly considered the parties' memoranda and exhibits and is ready to rule.

FACTS

The plaintiff, a black male, has been employed off and on with the U.S. Army Corps of Engineers (hereinafter referred to as the "Corps") since 1984. The plaintiff's employment has consisted of several terms of temporary employment as a motor vehicle operator in the bank grading unit. Throughout his employment, the plaintiff has regularly made application with the Corps for permanent positions, both full-time and seasonal.¹ The plaintiff asserts that he is the

¹ Apparently, there are three categories of employment with the Corps. Full-time employment is a permanent, year-round job. Seasonal employment is a permanent position which recurs on a yearly basis, but for less than twelve months at a time. Temporary employment is of short-term duration to fill a specific, temporary need.

victim of racial discrimination in that the Corps has failed to hire him for a permanent position.² The plaintiff, a disabled veteran with a 30% service related disability, further asserts that the Corps has failed to accord him the veteran's preference required by law. The plaintiff has filed suit for racial discrimination in violation of Title VII of the Civil Rights Act of 1964.

LAW

The defendants' motion is brought pursuant to Rules 12(b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure. In considering a motion under either Rule 12(b)(1) or 12(b)(6), the district court must accept all well-pleaded facts as true and view them in the light most favorable to the plaintiff. Baker v. Putnal, 75 F.3d 190, 196 (5th Cir. 1996). Dismissal is not appropriate unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief. Doe v. Hillsboro Indep. Sch. Dist., 81 F.3d 1395, 1401-1402 (5th Cir. 1996).

To pursue a claim under Title VII, federal employees must bring incidents of discrimination to the attention of their employer's equal employment opportunity ("EEO") counselor within forty-five days of the alleged event. 29 C.F.R. § 1614.105(a)(1). The plaintiff bears the burden of establishing that he acted in a timely fashion. Saltz v. Lehman, 672 F.2d 207, 209 (D.C. Cir. 1982). The plaintiff contacted an EEO officer on two occasions. The plaintiff filed an informal complaint of discrimination with the Corps' EEO office on October 27, 1991, but failed to follow said charge with a formal administrative complaint. The plaintiff again contacted the Corps' EEO office, this time through his attorney, on August 26, 1993. The

² Throughout this opinion, the term "permanent employment" or "permanent position" refers to both full-time and seasonal employment.

plaintiff subsequently filed charges of discrimination with the EEO office, which assigned a counselor to investigate the plaintiff's claims. The charges filed in 1993 led to the filing of the complaint in the present action. Thus, the issue is whether the alleged discriminatory event(s) occurred within forty-five days of August 26, 1993--the date of the plaintiff's initial contact with the EEO office.

The plaintiff has failed to allege any discriminatory acts that occurred within the applicable forty-five day period. The only event which the plaintiff asserts occurred in 1993 was an incident with an employee named Myron Case that involved the Corps' policy on cooking during working hours. Case was not a superior of the plaintiff, and the event could not possibly be related to the alleged failure to hire the plaintiff for a permanent position. Therefore, the 1993 event concerning a confrontation with Case will not be considered in assessing whether the plaintiff has met the timely filing requirement.

The majority of the plaintiff's specific allegations occurred in 1990 and 1991. To avoid the timely filing requirement, the plaintiff asserts the continuing violation doctrine, in which allegations regarding earlier acts are not time-barred when the last act of an ongoing pattern occurs within the filing period. See Rich v. Martin Marietta Corp., 522 F.2d 333, 348 n.15 (10th Cir. 1975); Belt v. Johnson Motor Lines, Inc., 458 F.2d 443, 445 (5th Cir. 1972). However the continuing violation doctrine is only applicable where the unlawful employment practice manifests itself over time, rather than as a series of distinct acts. Ross v. Runyon, 858 F. Supp. 630, 637 (S.D. Tex. 1994). The failure to hire is a distinct act, and therefore, to pursue litigation, the plaintiff must file a charge with the Corps' EEO office within forty-five days of the alleged failure to hire. Rivas v. State Bd. for Community College, 517 F. Supp. 467, 471 (D. Col. 1981);

see generally Dumas v. Town of Mount Vernon, Ala., 612 F.2d 974, 977-980 (5th Cir. 1980).

The plaintiff has not alleged any failure to hire within forty-five days of August 26, 1993.

The plaintiff has also alleged that the Corps failed to accord him the veteran's preference required by law. However, the plaintiff admits that he began complaining to the EEO office about the lack of veteran's preference as early as 1991. The defendant asserts that while it may not have had the plaintiff's preference listed accurately, it did correct the situation.³ The plaintiff knew of the alleged inaccuracy as early as 1991, but the charge of discrimination upon which this complaint is based was not filed until 1993. The plain language of the regulation provides that the deadline for filing an administrative complaint depends on when the plaintiff knew or should have known of the discriminatory event. Hatcher-Capers v. Haley, 786 F. Supp. 1054, 1058 (D.D.C. 1992). Thus, the plaintiff has clearly failed to meet the timely filing requirements of Title VII.

The plaintiff further attempts to excuse his untimely filing by stating that the Corps' EEO office would not accept his complaints. The court finds this excuse to be unavailing. It is undisputed that the EEO regulations, containing specific instructions on how and where to file a complaint, were posted for the plaintiff and all other workers to see. The plaintiff could have mailed his charges of discrimination to the EEO office by certified mail, return receipt requested, so that he would have a record of his attempted filing. The plaintiff's unsubstantiated allegation

³ The defendant further asserts that any inaccuracy in the plaintiff's personnel file did not cause him to lose any job opportunities as his application was kept in the applicant supply file. One of the requirements for retention in the applicant supply file was that the applicant have a 30% disability. The plaintiff admits that he received letters from the personnel office from 1985 through 1992, which stated that his application was retained in the applicant supply file and that he had been considered for certain positions within the Corps.

that the EEO office would not accept his complaints is insufficient to defeat the timely filing requirement of Title VII. For the court to accept the plaintiff's argument would undermine the timely filing provisions of Title VII in that any plaintiff could file an untimely Title VII complaint by merely alleging that the appropriate EEO office would not allow him to file timely charges of discrimination.

CONCLUSION

For the foregoing reasons, the court finds that the defendant's motion to dismiss should be granted. An order will issue accordingly.

THIS, the ____ day of June, 1997.

NEAL B. BIGGERS, JR.
UNITED STATES DISTRICT JUDGE